BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RICKY L. LEIGHTY	)	
Claimant	)	
	)	
VS.	)	
	)	
DERAILED COMMODITY	)	
Respondent	)	Docket No. **1,057,582**
	)	
AND	)	
	)	
ACCIDENT FUND INSURANCE	)	
Insurance Carrier	)	

ORDER

Claimant requests review of the August 31, 2012 preliminary hearing Order entered by Administrative Law Judge Brad E. Avery. William L. Phalen, of Pittsburg, Kansas, appeared for claimant. Ronald J. Laskowski, of Topeka, Kansas, appeared for respondent.

The record on appeal is the same as that considered by the ALJ and consists of the December 22, 2011 preliminary hearing transcript with exhibits; the August 24, 2012 continuation of the preliminary hearing transcript with exhibits; the March 7, 2012 evidentiary depositions of Marion Tennyson, Richard Scales and Douglas Brennon with exhibits; as well as the May 21, 2012 evidentiary deposition of Susan Buckle with exhibits, and all pleadings contained in the administrative file.

ISSUES

Judge Avery found claimant was an independent contractor and not an employee or statutory employee. Claimant requests review and argues that Judge Avery erred in failing to find that claimant was respondent's employee or statutory employee.

The sole issue raised on review is whether claimant was an employee or statutory employee of respondent, as opposed to being an independent contractor.

FINDINGS OF FACT

After reviewing the evidentiary record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

Respondent sells floor covering. Independent contractors install the floor covering. A sign at Derailed Commodity states independent contractors perform installation.

By 2011, claimant had worked as a professional flooring installer for 27-28 years. Claimant never filled out a job application with respondent and had no documentation of an employer-employee relationship with respondent.

Claimant contended he was hired by Douglas Brennon, respondent's manager, approximately five years before the continuation of the preliminary hearing on August 24, 2012. Mr. Brennon testified that claimant was already working with respondent before he became manager. Both Mr. Brennon and Richard Scales, respondent's assistant manager and estimator, characterized the claimant as an independent contractor, not an employee.

Claimant and other professional flooring installers would install materials in the manner they saw fit as professional installers. He testified respondent's representatives would "[e]very great once in a while . . . come and check . . ." job sites to oversee or inspect the work.[1] Claimant acknowledged that respondent would generally not need to approve his work before a customer paid him.

Another installer, Marion Tennyson, denied respondent directed him how to do work; rather, he would decide how to install material. He acknowledged that he will do work the way Mr. Scales wants it performed, but noted Mr. Scales rarely shows up at job sites, perhaps two to three times per year. Mr. Tennyson considers himself a private contractor and not respondent's employee. Mr. Tennyson testified that claimant's relationship with respondent was the same as his.

Mr. Scales is not a carpet or vinyl installer. He does not tell installers how to install product, although he sometimes tells installers where to have a seam. Mr. Scales prepares diagrams showing how product is going to be placed and gives the diagrams to the installers to ensure that product is installed correctly. The diagram also allows the customer to approve how product will be laid. However, installers often do not follow the diagrams and are not required to follow the diagrams. The independent installers can install the product any way they wish without Mr. Scales' approval. Mr. Scales denied being able to compel an independent contractor to work.

Claimant asserted respondent made him show up for work at a designated time and told him where, when and what to do. Claimant testified Mr. Scales made it clear to him that people who did not show up for work at a certain time would be fired. He also testified that he would show up on his own volition to see if work was available because respondent was a source of income and some days he would not show up because there was no work.

---

[1] P.H. Trans. (Dec. 22, 2011) at 8-9.

Mr. Scales denied telling the claimant he would be fired if he did not show up for work. Mr. Brennon admitted it was preferable for the independent contractors to arrive at respondent's location between 8:00 a.m. and 9:00 a.m. and while claimant was scheduled on a regular basis, Mr. Brennon never indicated there was a regular schedule. He noted that the independent contractors sometimes asked not to be scheduled when they were working elsewhere or had a conflict.

Respondent supplied claimant with carpet and tile previously purchased by respondent's customers. Claimant and other installers supplied their own tools and used their own vehicles, but were not paid mileage or for vehicle use.

Installers can sub-out jobs, hire and pay helpers, and use their own vehicles, tools and supplies. Claimant would occasionally hire and pay his nephews as helpers and he would have his girlfriend assist with work.

An independent contractor is free to reject work offered by respondent, for example, if working on his own or for another floor covering store or has a scheduling conflict. The independent contractors are allowed to contract with other flooring material suppliers or private individuals; claimant contracted with at least two other suppliers to provide installation. Mr. Brennon had no control if the independent contractors would cancel a job at the last minute or work elsewhere.

Claimant was paid by the job, not by the hour. Respondent never took taxes or social security from claimant's pay. Claimant never asked respondent for a paycheck or vacation, sick leave or fringe benefits. As an independent contractor, claimant did not get employee benefits, such as retirement, health insurance or vacation.

The various independent contractors, including claimant, agreed upon an industry-standard price to be paid per square yard and to provide customers with a one year warranty. Claimant testified respondent set the price for jobs, but Mr. Brennon testified different installer crews approached him about their pay. Claimant also testified to having input as to the price he agreed to accept, but quickly testified that he did not have any say as to what respondent paid. He was able to reject work if he did not agree to price paid by respondent, but the price was always agreeable.

Customers would pay installers directly and installers would keep the entire amount, sharing nothing with respondent. Installers can negotiate with customers for additional charges associated with extra work necessitated by hidden damage, without needing respondent's approval. The respondent, or the respondent's apparent corporate office, HMS Enterprises, Inc. (HMS), only pays independent contractors when a customer has paid for an entire job with a credit card or check.[2]

[2] The record is unclear what relationship might exist between respondent and HMS.

Claimant testified that he never received a 1099 form or any tax information from respondent. However, he had a business called Leighty Installation. HMS sent Leighty Installation 1099 forms for 2008, 2009, 2010 and 2011. Claimant viewed respondent and HMS as the same entity. Claimant has not filed income tax returns for the last eight years.

Respondent sold materials to Leighty Installation. A supplier or vendor named "R R & D Installation" submitted invoices to HMS listing Leighty Installation as the payee. Claimant and his girlfriend owned R R & D Installation. Checks paid to Leighty Installation were signed by claimant, his girlfriend or both of them.

Turning to the circumstances of the accident, claimant testified that "[e]very great once in a while" he would be paid by HMS or respondent to rework other installers' projects.[3] A Mr. Hughes bought vinyl flooring from respondent. Mr. Tennyson installed the flooring. Mr. Hughes was not happy with the result and wanted a different installer to redo the job. Mr. Scales told Mr. Tennyson he would have to pay for the repair and find another installer to redo the job. In lieu of paying another contractor, Mr. Tennyson asked claimant to help on the job and in return, he would help claimant on a future job.

Mr. Scales and Mr. Brennon understood the arrangement between claimant and Mr. Tennyson as trading work or an exchange of labor where claimant was helping on that job and Mr. Tennyson would help claimant on a later job. Mr. Scales denied respondent had anything to do with claimant working at Mr. Hughes' house.

Claimant testified Mr. Scales directed him to correct Mr. Tennyson's work at the Hughes' house on August 29, 2011. Claimant told Mr. Scales that he did not want to do the job, but would if Mr. Tennyson and his helper assisted. He did not know precisely what he was going to be paid by respondent.

Mr. Scales visited Mr. Hughes' house to see how the job was going. Claimant testified Mr. Scales told him how to perform the work and wanted him to take out the flooring in one-foot strips, but claimant instead pulled out the flooring in one piece. Mr. Scales denied instructing claimant or anybody how to perform the work.

Mr. Scales witnessed the claimant agreeing with Mr. Hughes to do additional work to repair rotten underlayment for $20. Mr. Hughes, not respondent, paid the claimant for such work. Respondent was not going to pay claimant anything.

Claimant slipped, fell and injured his left leg while repairing the underlayment. Claimant went to Neosho Memorial Hospital and identified himself as self-employed:

---

[3] P.H. Trans. (Dec. 22, 2011) at 13.

Q. And the reason you told the admissions person that you were self-employed is because you were in fact self-employed on August 29, 2011; were you not, sir?

A. You know what, I sure was.[4]

Claimant's business card identified him as an "INDEPENDENT CONTRACTOR" and guaranteed his work for one year.[5] A document on the cover of his job notebook stated he was an independent contractor with a one year warranty on installations.[6] The work order for the Hughes job listed claimant as an independent contractor.

PRINCIPLES OF LAW

Respondent is liable to pay benefits for an employee's compensable accidental injury. Claimant carries the burden of proof.[7] Kansas law regarding subcontracting, which allows a principal's workers to obtain benefits from a contractor, specifically does not allow benefits to self-employed subcontractors.[8]

An employee is defined, in part, as "any person who has entered into the employment of or works under any contract of service or apprenticeship with an employer."[9] The definition of employee does not include self-employed persons, absent an election. An independent contractor contracts to do certain work according to his own methods, without being subject to the control of his or her employer, except as to the results or product of his work.[10] The main test to determine whether an employer-employee relationship exists is whether the employer has the right to control, supervise and direct the employee's work.[11] "It is not the actual interference or exercise of the control by the employer, but the existence of the right or authority to interfere or control, which renders one a servant rather than an independent contractor."[12]

---

[4] P.H. Trans. (Dec. 22, 2011) at 24-25; Resp. Ex. D.

[5] *Id.* at 25; Resp. Ex. A.

[6] Brennon Depo. at 29; Resp. Ex. C.

[7] K.S.A. 2011 Supp. 44-501b(b)(c).

[8] K.S.A. 2011 Supp. 44-503(a).

[9] K.S.A. 2011 Supp. 44-508(b).

[10] *Falls v. Scott*, 249 Kan. 54, 64, 815 P.2d 1104 (1991).

[11] *Id.*

[12] *Id.*

While no absolute rule determines whether an individual is an employee or an independent contractor, the right of control is paramount.[13] Every case is determined on individual facts and circumstances.[14] *Hill v. Kansas Dept. of Labor*[15] sets forth various additional factors, including:

(1) the right of the employer to require compliance with instructions;

(2) the extent of any training provided by the employer;

(3) the extent the worker's services are integrated into the employer's business;

(4) the requirement that the services be provided personally by the worker;

(5) the worker's hiring, supervision and paying of assistants;

(6) existence of a continuing relationship between the worker and employer;

(7) the degree of establishment of set work hours;

(8) the requirement of full-time work;

(9) the degree of performance of work on the employer's premises;

(10) the degree to which the employer sets the order and sequence of work;

(11) the necessity of oral or written reports;

(12) whether payment is by the hour, day or job;

(13) whether the employer pays business or travel expenses of the worker;

(14) whether the employer furnishes tools, equipment and material;

(15) the incurrence of significant investment by the worker;

---

[13] *Hartford Underwriters Ins. Co. v. Kansas Dept. of Human Resources*, 272 Kan. 265, 270, 32 P.3d 1146 (2001).

[14] *Wallis v. Secretary of Kans. Dept. of Human Resources*, 236 Kan. 97, 102, 689 P.2d 787 (1984).

[15] *Hill v. Kansas Dept. of Labor*, 42 Kan. App. 2d 215, 222-23, 210 P.3d 647 (2009), *aff'd in part, rev'd in part* 292 Kan. 17, 23, 248 P.3d 1287 (2011); See also *McCubbin v. Walker*, 256 Kan. 276, 280-82, 886 P.2d 790 (1994).

(16) the ability of the worker to incur a profit or loss;

(17) whether the worker can work for more than one firm at a time;

(18) whether the worker's services are made available to the general public;

(19) whether the employer has the right to discharge the worker; and

(20) whether the employer has the right to terminate the worker.

ANALYSIS

The undersigned Board Member agrees with Judge Avery that claimant was an independent contractor and not respondent's employee or statutory employee.[16]

Respondent did not exercise control over claimant. Claimant testified in very simplistic terms that respondent told him when, where and how to work, but he also admitted being self-employed on the date of accident. He was free to perform work as he saw fit. Mr. Tennyson, Mr. Scales and Mr. Brennon testified respondent lacked control over independent installers' work and viewed him as an independent contractor. While claimant contends Mr. Scales somehow compelled him to work at Mr. Hughes' house, claimant indicated that he would not perform the job unless Mr. Tennyson and his helper were there to help. The claimant placing preconditions on agreeing to perform labor is inconsistent with a master and servant relationship.

The August 29, 2011 job ticket stated, "take up old vinyl[,] install new vinyl[,] repair floor if needed."[17] The job ticket does not establish control, except as to the end result.

Contrary to claimant's allegations, there is no proof that the respondent attempted to "game the system" or avoid payroll taxes, unemployment insurance or cost of workers compensation insurance by characterizing employees as independent contractors.[18]

In reviewing the 20 additional factors cited in *Hill,* this Board Member makes the following findings:

1. Respondent did not have the right to require claimant's compliance with instructions. Claimant ignored the one specific request from Mr. Scales that the vinyl at Mr.

---

[16] Judge Avery's reference to the claimant working "for the employer" in paragraph three of his decision is likely an error, insofar as he concluded claimant was an independent contractor.

[17] P.H. Trans. (Dec. 22, 2011), Cl. Ex. 1 at 1.

[18] Claimant's Brief at 1 (filed Sept. 28, 2012).

Hughes' house be removed in one-foot strips, instead opting to remove the vinyl in one piece. Given claimant's 27 or 28 years of experience installing flooring, it would seem unbelievable for him to take instruction from Mr. Scales, who is not a professional flooring installer. Claimant presented no specific examples of how he complied with any instructions from respondent, if any.

2. There is no evidence that respondent trained claimant. Claimant had decades of experience before becoming associated with respondent.

3. Claimant's services were not integral to respondent's business. Respondent sold floor covering, had no installer-employees and did not make money off independent installers' work. While respondent's phone book advertisements and internet page stated flooring installation was available, neither indicated respondent had employee installers.[19]

4. Claimant's services were provided personally to respondent's customers, not to respondent. He could subcontract his jobs to other installers.

5. Claimant hired helpers to assist him.

6. Claimant provided approximately four years of independent installation for respondent prior to his injury, but also worked with other flooring businesses.

7. Claimant testified that he was required to show up at a certain time every working day, while all other witnesses denied such allegation, generally indicating that it made sense to show up to respondent's location to verify if work was available and to get work completed in a timely fashion.

8. There is no proof claimant was required to work full-time for respondent.

9. Claimant's work was performed at customers' residences, but he would stop by respondent's business to check on available jobs and transport customers' materials.

10. It appears respondent wanted work started in the morning. Claimant could opt out of working certain days, cancel jobs or work elsewhere. He apparently was unavailable to work for about 12-18 months based on Mr. Brennon's characterization that claimant "disappeared" years prior to resuming a contractor relationship with respondent.[20]

11. Claimant was not required to make oral or written reports to respondent.

---

[19] P.H. Trans. (Aug. 24, 2012), Cl. Ex. 1-2.

[20] Brennon Depo. at 21.

12. Claimant was paid by the job, not by the hour or any other method. Respondent took no taxes or social security out of claimant's pay. Respondent provided multiple Form 1099s to Leighty Installation. Such form is generally understood by this Board Member to apply to independent contractors. There is no evidence claimant was provided tax forms that suggest an employer-employee relationship, such as a W-2.[21]

13. Claimant used his own truck and was not reimbursed for gas, mileage, business or travel expense.

14. Claimant provided all of his tools, equipment, truck, spacers and nails. The respondent did not supply anything. Customers purchased flooring materials from respondent. Claimant would install the customer's tile, vinyl or carpet.

15. Claimant invested in his tools, equipment, truck, spacers and nails.

16. Claimant was paid by the job and could therefore incur profit or loss.

17. Claimant contracted with other flooring businesses. Respondent placed no restrictions on claimant's ability to contract with other business or individuals.

18. Claimant contracted with other flooring material businesses. He had a business named Leighty Installation. Claimant and his girlfriend had a vendor or supplier company called R R & D Installation. As indicated by Judge Avery, claimant held himself out to the public as an independent contractor.

19. & 20. Claimant testified he could be fired. Other witnesses disagreed. Unreliable contractors would likely not be used for future jobs.

The foregoing factors establish that claimant was a self-employed independent contractor, not respondent's employee.

This Board Member further agrees with Judge Avery that claimant and Mr. Tennyson agreed to an exchange of labor whereby claimant would try to fix Mr. Tennyson's failed installation at the Hughes' house in exchange for Mr. Tennyson helping claimant on a future job. Respondent did not direct claimant to do the work on the date of accident, as the arrangement was between claimant and Mr. Tennyson.

Claimant was not a statutory employee on the date of accident. The only person or entity controlling claimant on the date of accident was himself. In any event, K.S.A. 44-503(a) precludes benefits for a self-employed subcontractor.

---

[21] P.H. Trans. (Dec. 22, 2011) at 41.

Finally, it is contradictory for claimant to have held himself out as an independent contractor up until the time he was injured, only to subsequently allege being respondent's employee.[22] Respondent had every right to rely on claimant's representation that he was an independent contractor.

CONCLUSION

This Board Member finds that claimant was an independent contractor and not an employee or statutory employee of respondent.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[23] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[24]

WHEREFORE, the undersigned Board Member finds that the August 31, 2012 preliminary hearing Order entered by Administrative Law Judge Brad E. Avery is affirmed.

IT IS SO ORDERED.

Dated this _____ day of October, 2012.

_____
HONORABLE JOHN F. CARPINELLI
BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
wlp@wlphalen.com

Ronald J. Laskowski, Attorney for Respondent and its Insurance Carrier
kristi@LaskowskiLaw.com
Ron@LaskowskiLaw.com

Brad E. Avery, Administrative Law Judge

---

[22] See *Marley v. M. Bruenger & Co., Inc.*, 27 Kan. App. 2d 501, 505-06, 6 P.3d 421, *rev. denied* 269 Kan. 933 (2000)

[23] K.S.A. 2011 Supp. 44-534a.

[24] K.S.A. 2011 Supp. 44-555c(k).